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No. 92-1315

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JOE B. SHANER and CYNTHIA K. SHANER,
Petitioners,

v.

UNITED STATES OF AMERICA
and DOUGLAS G. DIETRICH,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONERS' REPLY MEMORANDUM

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FOR THE SIXTH COURT

PETITIONERS' REPLY MEMORANDUM

I.

Petitioners' First Question Is Ripe For Review.

Petitioners were not mere applicants for an FmHA loan. Their loan applications were approved subject to specific approval requirements. Petitioners met those requirements. Respondents cancelled the approval in the processing stage after

incorrectly determining that one of the requirements -- a lien -- could not be met.

A. Respondents Mischaracterize The First Question Presented.

Respondents mischaracterize the first issue presented by the Petition in an attempt to persuade the Court that Petitioners have failed to present a question ripe for review. Contrary to Respondents' assertions, Petitioners do not argue that any applicant for government assistance who simply meets general statutory or regulatory eligibility criteria has a Fifth Amendment property interest in that assistance. (Resp. Br. 5-7.) Instead, Petitioners argue that an applicant for government aid whose application has been approved, and who in fact meets all the specific approval conditions imposed on him by the government agency has a reasonable expectation of receiving that aid and, therefore has a

protectible property interest in the aid. Thus correctly framed, the Petition presents an issue that has divided the lower courts and has been left open by this Court.

Petitioners were decidedly not "mere applicants." It is undisputed that:

- Petitioners received a letter from the FmHA stating unequivocally that their "[l]oans have been approved in the above amounts, subject to the availability of funds. Please see your copy of the enclosed Farm and Home Plan for the use of these funds." Pet. App. 53a.

- The FmHA drew checks payable to Petitioners in the loan amounts, indicating the funds were in fact available.

- The FmHA executed a formal loan approval stating the only further requirement was that the FmHA receive a first lien on Petitioners' 1982 crops.

- Petitioners were willing and able to grant a first lien on their 1982 crops, but Respondent Dietrich cancelled the loans after erroneously determining that the lien was unavailable.

In Petitioners' case, the process had advanced to a point just short of actual loan

disbursement. Contrary to Respondents' contention (Resp. Br. at 5-7), Petitioners do not argue that the FmHA regulations created a mandatory right to loan approval. To be sure, Petitioners met those requirements. But they also satisfied the specific requirements the FmHA imposed as a condition of approving their particular loans. The Petition thus squarely raises the question whether a protectible property interest arises once a loan has been approved and all application-specific approval requirements have been met.

The Court of Appeals tautologically held that, because the FmHA has discretion to approve loans, no protectible property interest can arise even where the agency has completed exercising its discretion and has approved the loan. Compare Pet. App. 2a ("Dietrich issued a certificate of approval") with id. 5a ("[Petitioners'] interest in

obtaining an emergency loan was too speculative to be considered a property right"). Respondents do not attempt to deny that several Court of Appeals have recognized a protectible Fifth Amendment interest where an applicant for government benefits meets all the requirements imposed on him or her. Hoffman v. City of Warwick, 909 F.2d 608, 619 (1st Cir. 1990); Daniels v. Woodbury County, 742 F.2d 1128, 1132-33 (8th Cir. 1984); Ressler v. Pierce, 692 F.2d 1212, 1215 (9th Cir. 1982); Holbrook v. Pitt, 643 F.2d 1261, 1278 n.35 (7th Cir. 1981); Winsett v. McGinnes, 617 F.2d 996, 1007 (3rd Cir. 1980) (cited with approval in Midnight Sessions, Ltd. v. City of Philadelphia, 945 F.2d 667, 679-80 (3rd Cir. 1991)); Griffeth v. Detrich, 603 F.2d 118, 121 (9th Cir. 1979). In a footnote, Respondents attempt to distinguish those cases by arguing that they all involve statutory or regulatory schemes under which a

government agency must award aid if specified eligibility criteria have been met. Resp. Br. at 6 n.4. That distinction does not explain all these cases,[1/] and, in any event, is not relevant here, because Petitioners relied on having met not only the statutory and regulatory criteria but also on the specific conditions the FmHA tailored to their loan approval.

This Court should grant certiorari to resolve the still-open question whether an applicant for government aid, who meets all the requirements and whose application has been approved, has a protectible Fifth Amendment property interest in that aid. Granting review will provide an opportunity to define the contours of protectible property interests arising from applications for government aid. Petitioners do not

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1/ Neither Ressler, 692 F.2d at 1215, nor Winsett, 617 F.2d at 1007, involved mandatory benefit schemes.

assert that a Fifth Amendment claim arises each time an application is filed. But Petitioners do argue that citizens' legitimate expectations arising upon application approval should be protected from arbitrary and capricious acts of government officials.

B. Respondents' Claim To Qualified Immunity Was Not Resolved Below And Is Not Meritorious.

Respondents also assert that this Court should not grant the writ because the responsible FmHA official is shielded from liability by qualified immunity. Resp. Br. at 7-9. Respondents do little more than assert that the FmHA official has a qualified immunity defense "available." Resp. Br. at 8. Neither the Court of Appeals nor the District Court resolved the issue, and

Respondents do not show that such a defense should succeed.

Respondents have the burden of establishing a basis for qualified immunity. Forrester v. White, 484 U.S. 219, 224 (1988). Here, Respondents have failed to establish a key prerequisite for qualified immunity: that the actions complained of involved a discretionary function. As this Court has held:

> immunity generally is available only to officials performing discretionary functions. In contrast with the thought processes accompanying 'ministerial' tasks, the judgments surrounding discretionary action almost inevitably are influenced by the decision-maker's experiences, values and emotions.

Harlow v. Fitzgerald, 457 U.S. 800, 816 (1982) (emphasis added); accord, Anderson v. Creighton, 483 U.S. 635, 638 (1987).

Respondent Dietrich was not performing a discretionary function when he cancelled Petitioners' approved emergency loans. Indeed, in rejecting Respondents' immunity

defense under the Federal Tort Claims Act ("FTCA"), 28 U.S.C § 2680(a), the District Court found that Dietrich was not performing a discretionary function. The District Court's FTCA analysis closely parallelled a qualified immunity analysis here:

> The complaint is concerned with the defendants' actions concerning the processing of the plaintiffs' loan. This does not involve a policy judgment or determination by the defendants and does not constitute the administration of a loan program. Furthermore, the defendants' decision was prescribed by specific regulatory guidelines.

Pet. App. 36a.

Respondents claim the "availab[ility]" of qualified immunity because Petitioners' constitutional right was not "clearly established." Resp. Br. at 8. But Respondent Dietrich's performance of a ministerial task rather than a discretionary function moots that argument. This Court need not decide whether the right at issue

was "clearly established" and should not deny review based on Respondents' invocation of immunity.

II.

Petitioners Have A Protectible Property Interest In Access To The FmHA's Mandatory Appeal Process.

Petitioners argue that their right of access to the FmHA appeal process is a species of property right protected by the Fifth Amendment Due Process Clause. In response, Respondents argue that access to the FmHA's appeal process is not a substantive interest but rather is simply a procedural interest not subject to constitutional protection.

Respondents' argument misconstrues this Court's teaching in Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982). Logan addressed the type of protected property interest at issue here: the right to receive timely agency adjudication of a claim. To be

sure, as Respondents observe (Resp. Br. at 9) this Court held in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950) that Due Process Clause rights are triggered only when a liberty or property interest is at stake. But Logan expressly rejected Respondents' position that a right to seek redress cannot constitute a "property" interest in Due Process Clause terms:

> [W]e see no meaningful distinction between the cause of action at issue in Mullane and Logan's right to use the [agency's] adjudicatory procedures.

Logan, 455 U.S. at 429. The Court went on to explain:

> The hallmark of property, the Court has emphasized, is an individual entitlement grounded in state law, which cannot be removed except "for cause." [Citations omitted]. Once that characteristic is found, the types of interests protected as "property" are varied and, often as not, intangible, relating "to the whole domain of social and economic fact." [Citations omitted].

> The right to use the [agency's] adjudicatory procedures shares these characteristics. A claimant has more than an abstract desire or interest in redressing his grievance: his right to redress is guaranteed by the State, with the adequacy of his claim assessed under what is, in essence, a "for cause" standard, based upon the substantiality of the evidence.

Id., 455 U.S. at 430-31.

The FmHA regulations governing access to the appeals process possess the characteristics the Court in Logan held were a property interest: a right to seek redress based on substantiality of the evidence. An applicant for FmHA emergency loans has an unequivocal right of access to the FmHA's appeal procedures. See 7 C.F.R. § 1900.56 (Pet. App. 57a-58a). Moreover, the FmHA appeals process is governed by express standards. The hearing officers' decision "shall be based on facts presented at the hearing, appropriate FmHA files, applicable statutes and regulations, and the hearing officer's general knowledge of FmHA program

functions." 7 C.F.R. § 1900.57(h) (Pet. App. 59a). Like the agency adjudicatory process in Logan, the FmHA process is thus controlled by "what is, in essence, a 'for cause' standard," Logan, 455 U.S. at 431, and is a species of protected property.

The two principal cases on which Respondents rely are not to the contrary. In neither Olim v. Wakinekona, 461 U.S. 238, 249-50 (1983) nor Hewitt v. Helms, 459 U.S. 460, 471 (1983) did the plaintiffs assert that access to an adjudicatory process was a species of property. Rather, in both cases prison inmates argued that existing procedural safeguards created a separate liberty interest in their conditions of confinement. Neither case even cites Logan or purports to limit its reach.

Respondents' error stems from their mischaracterization of Petitioners' claim. Petitioners do not claim a constitutional

violation based merely on Respondents' failure to follow agency procedures.[2/] Rather, Petitioners here, as in Logan, assert a denial of access to the agency's adjudicatory mechanism. Where this case differs from Logan is only in the remedy sought. In Logan, the remedy was to afford the claimant the adjudication he had been

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[2/] Respondents' reliance on United States v. Caceres, 440 U.S. 741 (1979) (Resp. Br. at 10) is wholly misplaced. In Caceres, this Court did not hold that an agency's failure to follow its procedure was immune from due process attack. Caceres was an exclusionary rule case in which the respondent sought exclusion from his criminal trial of evidence obtained in violation of agency regulations. Id, 440 U.S. at 755. The Court said nothing there about civil remedies for violation of the Fifth Amendment. Similarly, Respondents incorrectly assert (Resp. Br. at 10 n. 1) that Hewitt rejected the notion that an agency's failure to follow its procedures could result in a constitutional violation. To the contrary, this Court in Hewitt found that an agency's procedural safeguards in fact created a protectible liberty interest. 459 U.S. at 471-72. Moreover, Hewitt (like Olim, on which Respondents also rely) involved prison regulations, as to which the Court has invoked narrower due process protection than in other cases. See Hewitt, 459 U.S. at 467.

denied. Here, the adjudication was offered too late, and Petitioners seek damages for losing their farm.

CONCLUSION

For the foregoing reasons and those stated in the Petition, the Petition for a Writ of Certiorari should be granted.

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